IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 15th November,1995.

CRIMINAL APPEAL NO. 787 OF 1990

For Approval and Signature:

THE HON'BLE MR. JUSTICE A.N. DIVECHA

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not ?

3. Whether Their Lordships wish to see the fair copy of Judgment ?

4. Whether this case involves substantial question of law as tothe interpretation of the Constitution of India, 1950 or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

Shri H.M. Chinoy, Advocate for the appellant.
Shri S.R. Divetia, Additional Public Prosecutor for the respondent.

Coram: A.N. Divecha,J. & H.R. Shelat,J.
(15-11-1995)

ORAL JUDGMENT: (Per: A.N. Divecha, J.)

1. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge at Mehsana on 19th July 1990 in Sessions Case No. 117 of 1989 convicting the appellant of the offence punishable under Section 8 read with Section 20 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act for brief) and sentencing him to rigorous imprisonment for 10 years and fine of Rs.1,00,000/- in default rigorous imprisonment for 2 years more is under challenge in this appeal at the instance of the original accused.

2. It is not necessary to set out in detail the facts giving rise in this appeal. It will be sufficient to note that upon information received one unarmed Head Constable having buckle No. 1239 attached to the city police station at Kalol searched the person of the appellant on 23rd April 1986 and found from his person 5 small pills of what is popularly known as charas worth about Rs.5.00. Thereupon the police official lodged his complaint. The proceeding arising therefrom was registered as Sessions Case No. 117 of 1989. It appears to have been assigned to the learned Additional Sessions Judge at Mehsana for trial and disposal. Ultimately it culminated into the judgment and order of conviction and sentence passed by the learned Trial Judge as aforesaid. The aggrieved accused has thereupon invoked the appellate jurisdiction of this Court by means of this appeal.

3. It transpires from the evidence on record that the appellant accused was given no option whether or not he would like to be searched in the presence of a Gazetted Officer or a Magistrate as required by Section 50 of the Act. In its ruling in the case of Saiyad Mohd. Saiyad Umar Saiyad & Ors. vs. State of Gujarat, reported in 1995 (2) XXXVI (2) G.L.R. at Page 1315, the Apex Court has held the relevant provisions contained in Section 50 of the Act to be mandatory. Non-compliance with the mandatory requirements of law is held to be fatal to the prosecution case. The aforesaid binding ruling of the Supreme Court is in all fours applicable in the present case. Even at the cost of repetition we reiterate that at the time of search of the person of the appellant no option was given to him whether or not he would like to be searched in the presence of a Gazetted Officer or a Magistrate. In that view of the matter, the impugned judgment and order of conviction and sentence cannot be sustained in law. Since we are disposing of this appeal on this very short point, we have not chosen to deal with other submissions urged before us by both the sides.

4. In the result, this appeal is accepted. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge at Mehsana on 19th July 1980 in Sessions Case No. 117 of 1989 convicting the appellant of the offence punishable under Section 8 read with Section 20 of the Act and sentencing him to rigorous imprisonment for 10 years and fine of Rs.1,00,000/-, in default rigorous imprisonment for 2 years more is quashed and set aside. The appellant accused is ordered to be set at liberty if no longer required in any other case.

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